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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1625 K Street, N.W.,
Washington 6, D.C.,
Attorneys for Petitioners.

Of Counsel:

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California.

BENJAMIN V. COHEN,
1727 Massachusetts Avenue,
Washington, D.C.

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BRIEF FOR PETITIONERS

Opinions Below

The majority and dissenting opinions in the Court of Appeals for the District of Columbia Circuit, issued on January 13, 1966, are reported at 356 F. 2d 351 and appear in the Record at pp. 69 to 99.

Jurisdiction

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit were entered on January 13, 1966, and a timely petition for rehearing was denied by

order of February 24, 1966 (R. 100-102). The petition for writ of certiorari was filed on May 23, 1966 and was granted on October 24, 1966 (R. 102). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

The court below denies thousands of Japanese-American citizens return of their seized savings deposits because of the Government's plea of a 60-day statute of limitations, despite the fact that the Government long ago recognized their right to repayment and has the funds available therefor. The question presented is whether, in a suit under the Trading With the Enemy Act, federal courts are precluded from applying equitable estoppel or tolling against the Government's limitations plea in circumstances where such a limitations plea by a private litigant would be estopped to prevent a fundamental injustice.

Statute Involved

Section 34(f) of the Trading With the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C. App. § 34(f), provides in part:

> "If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as de-

fendant . . . Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review."

Statement

It is a rare case wherein a federal Court of Appeals concedes the presence of manifest injustice but finds itself without authority to cure it. This is such a case. In the same breath the majority opinion below recognizes that "unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank command sympathetic consideration of their problem" (R. 83), and then finds federal courts powerless to prevent injustice by estopping or tolling the 60-day statute of limitations of the Trading With the Enemy Act.

The court below thereby leaves divested of judicial redress thousands of Japanese-Americans seeking a return of their savings accounts seized on Pearl Harbor Day, even though their debt claims have long been recognized by the Government as valid and adequate vested funds are on hand for their payment. The court's self-denying ordinance causes American citizens to forfeit their statutory debt-claim rights because in 1961, 20 years having elapsed after

Pearl Harbor Day before the Government finally adjudicated their claims, petitioners delayed more than 60 days in filing suit against the Department of Justice while awaiting resolution of the yen-dollar ratio issue then pending in litigation. See *Aratani* v. *Kennedy*, 317 F. 2d 161; No. 321, October Term, 1963; *Abe* v. *Kennedy*, Civ. Action 2529-61 (D.C. D.C.).[1] We set forth below the sequence of events which present the question whether federal courts are precluded from achieving an equitable result by estopping or tolling a limitations period pleaded by the Federal Government under the Trading With the Enemy Act.

1. *Seizure and Vesting*

Petitioners are thousands of residents and citizens of the United States, persons of Japanese ancestry, who had individual yen deposit accounts in 1941 in the California Branch of the Yokohama Specie Bank, Ltd. Their yen certificates, issued in the United States in exchange for dollar deposits, were redeemable in dollars at the Bank in the United States or in yen at the Bank's offices in Japan (R. 1). On December 7, 1941, California seized the domestic assets of the Yokohama Specie Bank as enemy property, and in 1943 those assets, including the funds petitioners had on deposit, were "vested" under the Trading With the Enemy Act (see 8 Fed. Reg. 5608).

During the war, petitioners could not, of course, obtain payment from the Yokohama Bank in Japan. The Government having taken the Bank's domestic assets, peti-

[1] The *Aratani* litigation, which was before this Court at its 1963 Term, involved the yen-dollar ratio issue as raised by depositors in the Sumitomo Bank. The *Abe* suit involved petitioners' fellow-depositors in the Yokohama Specie Bank, Ltd. Because the OAP's Sumitomo Bank schedule was first published, the *Aratani* case proceeded to this Court while the subsequent *Abe* suit remained in the District Court awaiting the outcome of *Aratani*. When *certiorari* was granted in *Aratani*, and the Government thereupon settled that case, it simultaneously settled *Abe* (see pp. 8 to 10, *infra*).

tioners' choses in action were effectively seized by the Government while the yen-dollar exchange rate declined by the end of the war to less than 2% of pre-war value, where it remains today. While their savings accounts thus remained "frozen" and unavailable, most of the petitioners were evacuated from the West Coast, many to work as farm laborers. Illustrative is the case of petitioner Michiko A. Terao, whose affidavit discloses (R. 15) that although she was the wife of a member of the United States Army who was wounded in battle, awarded the Purple Heart, and became permanently paralyzed by his battle injuries, during the war she was evacuated to Colorado with minimum personal belongings to work as a sharecropper.[2] After the war, administrative delays consumed many more years before the OAP finally issued its ruling in 1958 (and its schedule in 1961) allowing Yokohama Bank claimants a return on their savings accounts at the 2% post-war yen-dollar conversion ratio. That formula would have afforded Mrs. Terao about 70 cents on her 220 yen deposit which had an actual value on Pearl Harbor Day of approximately $50.00 (R. 16). Ultimately, after this Court granted certiorari in *Aratani*, the Government changed its position and granted those claimants who had sued in 1961 to challenge the 2% return ratio their full original yen deposits in the Yokohama Specie Bank. But it took the position that Mrs. Terao and her thousands of fellow petitioners before this Court were precluded from a similar return because they did not sue within 60 days after the OAP's Yokohama Bank schedule to challenge the Government's 2% restitution formula.

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[2] For accounts of the mistreatement of the Japanese-Americans by the Government during the war, see *Ex Parte Endo*, 323 U.S. 283; *Acheson* v. *Murakami*, 176 F.2d 953 (C.A. 9, 1949); *Hirabayashi* v. *United States*, 320 U.S. 81; Grodzins, *Americans Betrayed* (Univ. of Chicago Press, 1949); cf. *Takeguma* v. *United States*, 156 F. 2d 437, 442 (C.A. 9, 1946).

2. *The 20-year Administrative Delay*

Following this Court's ruling in *Markham* v. *Cabell,* 326 U.S. 404, Congress amended the Trading With the Enemy Act in 1946 by codifying and regulating debt claims procedure. Some 7,500 yen deposit holders in the Yokohama Specie Bank, including petitioners herein, thereupon filed timely debt claims under Section 34 of the Act, based upon their 1941 deposit accounts in the Yokohama Bank (R. 2, 25). Thereafter, many years passed before the Government made its determination on their claims. During these years, the test case in the Department of Justice on the Yokohama Bank claims was that of *Kunio Abe,* Claim No. 55507. Therein, a Hearing Examiner ruled on January 31, 1957, that the claims were to be honored by the Custodian at the pre-Pearl Harbor conversion ratio of approximately four yen to the dollar. However, later in 1957 the Director of the OAP, with the approval of the Attorney General, overruled the Examiner and held that the proper payment formula was the post-war conversion ratio of 361.55 yen to the dollar—less than two percent of the actual value of these savings accounts when they were seized on Pearl Harbor Day (R. 2).

Following that determination, identical or very similar letters were sent in 1958 to each of the 7,500 Yokohama Specie Bank claimants (R. 6, 29, 52), wherein the Government recognized the validity of the applicant's claim (see R. 29-30) but offered to pay only at the post-war ratio of 361.55 yen per dollar. For most of the claimants, whose deposit accounts were modest, this 1958 offer of return actually was a proposal to pay only a few dollars or even pennies—frequently less than what it had cost to file the statutory claim with an authenticated copy of the yen deposit certificate (see R. 12, 13, 16). And there was added in

the OAP letter the unexplained and arbitrary demand for the surrender of each claimant's original deposit certificate.

Even a cursory reading of the OAP letter (R. 6) demonstrates the confusion, insult and arbitrariness of the Government's peremptory 1958 demand for surrender of original deposit certificates upon its offer of a 2% return on 1941 savings deposits. Worse yet, payment of even the 2% was not being offered, but was left to be effected at some indeterminate future date following publication of the OAP schedule (R. 7). Moreover, the letter volunteered the suggestion that "under the circumstances [the 2% future return], you may wish to utilize the funds in Japan rather than await settlement by this Office" and, if so, it instructed that the claim previously filed "should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card" (R. 7).

The recipients of the 1958 letter were naturally reluctant to surrender their original deposit certificates in response to a communication stating that "if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of" 2% of 1941 value (R. 29). Of the 7,500 Yokohama Bank claimants, about 1,800 sent in their original deposit certificates as requested, fewer than 1,600 returned the claim cancellation card attached to the letter, while the remaining 4,100 claimants neither withdrew their claims nor sent in their original certificates. These 4,100 claimants are petitioners before this Court. They feared to surrender their original certificates constituting their last tangible evidence of claim, believing that such surrender might constitute acquiescence in a two percent return; and because of illiteracy, poor command of English, lack of counsel, and similar reasons, many simply did not understand the complex 1958 letter of instructions from the OAP (R. 2, 3; see affidavit of Kat-

suma Mukaeda, President of the Japanese Chamber of Commerce of Southern California, R. 18-20).

In due course, after failure to receive the original deposit certificate, a notice was sent by the Government to each petitioner in 1959 advising that his claim was dismissed and referring to section 34(f) of the Act as governing "any further proceedings" (R. 33).

3. *The 1961-1964 Litigation*

In 1961 the OAP's Yokohama Bank debt claim schedule was finally published, listing at 2% of 1941 value those claims for which original deposit certificates had then been received. Within sixty days following the publication of that schedule, a suit was filed in the U. S. District Court for the District of Columbia challenging the conversion formula representing a 2% return. *Abe* v. *Kennedy*, Civ. Action 2529-61. The suit, paralleling the then pending *Aratani* litigation involving Sumitomo Bank depositors, was brought on behalf of all of the Yokohama Bank claimants appearing on the 1961 OAP schedule, and the first named plaintiff was Kunio Abe, whose claim had been the test case within the Justice Department for all of the Yokohama Bank claimants. Petitioners were unaware of the difference between those claimants on the 1961 schedule and those dropped because of failure to send in their original certificates and thus technically not within the class of plaintiffs suing in *Abe* (R. 12, 14, 16, 19). They reasonably anticipated and had a right to anticipate that if the two percent formula which had long been in administrative litigation were reversed by the courts in the *Abe* suit, all Yokohama Bank depositors who had filed timely claims under the Act which the Government had recognized as valid would be similarly compensated. That expectation was frustrated by the refusal of the Government in 1964

to make the same restitution to petitioners that it afforded the *Abe* plaintiffs in a settlement following this Court's grant of certiorari in *Aratani*.

The *Aratani-Abe* settlement came about in this way. In 1963 the Court of Appeals' *Aratani* ruling upheld the application to Sumitomo Bank debt claims of the post-war yen-dollar conversion ratio, thus limiting return to two cents on the dollar (317 F. 2d 161). *Certiorari* was sought and granted by this Court (375 U.S. 877). The Government thereupon removed the case from this Court's consideration by entering into a multi-million dollar settlement arrangement with the Sumitomo Bank plaintiffs in *Aratani*—and the Yokohama Bank claimants in *Abe*—which this Court referred to the District Court for approval (376 U.S. 936). The settlement formally approved in 1964 (228 F. Supp. 706 and see *infra*, Appendix, p. 48) represented a distribution to each *Abe* claimant of one hundred percent of his yen account at the pre-war conversion ratio, but without interest.

Prior to the *Abe* settlement with the Yokohama Bank claimants, petitioners in the case at bar had filed timely Yokohama Bank claims which OAP had recognized as valid, had awaited the resolution of *Abe* and had expected to be given the benefit of a successful outcome thereof. After the *Abe* settlement was announced but before it was approved by the District Court, petitioners asked the Department of Justice to honor their claims *on the same basis* (100% of 1941 value without interest) on which it was paying in *Abe*. They pointed out that the Government had long ago recognized the validity of their debt claims, that Yokohama Bank assets in the possession of the Government were adequate to afford them the same return given in *Abe*, and that fundamental justice required equal treatment for all similarly situated depositors. And they emphasized that the Government, having withdrawn the *Ara-*

tani test case from this Court's jurisdiction after *certiorari* had been granted, could reasonably have been expected by equal treatment among yen deposit claimants to resolve the entire issue of Japanese savings accounts without subjecting this Court to its further consideration at a subsequent date.[3] However, the Government, though it concedes the power and has the funds to make the same restitution to these claimants afforded the *Abe* plaintiffs, declined their 1964 request to do so (R. 42, 46).

4. *The Litigation Below*

Following the Government's 1964 refusal to award the benefit of the *Abe* restitution to claimants who had not transmitted their original deposit certificates between 1958 and 1961, petitioners filed this action under Section 34(f) of the Trading With the Enemy Act (R. 1) on May 19, 1964, one day following issuance of the formal order of the District Court approving the *Abe* settlement and before that order had become final (see *infra*, p. 38). The Government countered by pleading the sixty-day statute of limitations of Section 34(f). It urged in the courts below that however reasonable petitioners' conduct may have been in withholding suit while the *Abe* case was pending in the courts, the sixty days for suit inexorably expired in 1961 and the federal courts thereby lost jurisdiction to grant relief.

Petitioners' principal argument below was that where grave injustice results and no statutory purpose is served

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[3] Petitioners also emphasized to the Department of Justice, but equally without avail, their superior equities as contrasted with the claimants in the Interhandel case. Following this Court's procedural reversal in that case (*Societe Internationale* v. *Rogers*, 357 U.S. 197), the Government entered into a multi-million dollar settlement with the alien claimants, denying to the end their substantive eligibility for a return. By contrast, in the present case the Government has declined to make a return to numerous American citizens it has long ago deemed eligible for return of the amounts representing their modest savings on deposit at the time the war commenced.

by applying limitations, the District Court has power to bar the Government's plea of limitations under the doctrine of equitable estoppel recently confirmed in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, or the doctrine of tolling recognized in *Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424. In that respect it was urged (see R. 75, 79-81):

(i) that petitioners, who had awaited the outcome of the *Abe* case, differed from the plaintiffs in *Abe* only in their failure to comply with the Government's wrongful demand: the confusing, insulting, and arbitrary 1958 demand for the surrender of original deposit certificates in connection with a legally inadequate offer of a two percent return;

(ii) that petitioners were fully justified in declining to surrender their original deposit certificates in 1958 which the Government peremptorily demanded in conjunction with its 2% offer and that their failure to sue while *Abe* was in litigation was excusable delay in view of their reasonable reliance upon the Government's power and duty to treat them equally with their fellow-claimants in *Abe*;

(iii) that there was no prejudice whatsoever from delay in suit between 1961 and 1964, since the vested Yokohama Bank fund to which petitioners look for return had simply remained dormant in the possession of the Government, just as it had for the preceding twenty years;

(iv) that, where the obligation of suit arises in the first instance from summary Government seizure of private property without judicial process, a serious Fifth Amendment issue arises if Congress is deemed to have precluded any equitable estoppel or tolling of the 60-day limitation of the Act.

But the District Court dismissed the petitioners' suit for lack of jurisdiction (R. 36, 66), accepting the Government's

argument that, because of sovereign immunity, estoppel against limitations does not lie under a statute authorizing suit against the United States. Dividing 2 to 1, the Court of Appeals affirmed the District Court's ruling, chiefly on the ground that "estoppel cannot be used against the Federal Government" (R. 78). The majority opinion below purports to answer the Fifth Amendment objection to Government immunity from estoppel under this Act by stating (R. 80-81) that no due process is due petitioners because, as mere savings-depositor "creditors" of the Yokohama Bank, it is not their property which the Government has appropriated and accordingly they have "no property right" in the vested assets. In so holding the majority below refused to recognize that the Government's taking of all the assets of the Yokohama Bank in this country was in effect the seizure of the depositors' rights against the bank—manifest property rights. And the majority opinion obscures the fact that by the taking of the domestic assets of the Yokohama Bank during the war, petitioners were precluded from redeeming their deposit certificates during the years that the value of the yen dropped to 2% of the 1941 exchange rate.

A detailed critique in the dissenting opinion of Judge Wright (R. 89-99) emphasizes that this Court's decision in *Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424, makes estoppel or tolling of limitations hinge on broad principles of equity. It points out that in fact the Government represented to all Yokohama Specie Bank claimants in 1958 that no more than 2% was available on a return of their yen savings accounts, and that petitioners are now seeking to rely upon the change of the Government's position in 1964 when it settled with their fellow claimants in *Abe* at full value following this Court's grant of *certiorari* on the conversion ratio issue. Judge Wright carefully reviews authorities demonstrating the error of the view that limi-

tations estoppel cannot be applied to the Federal Government, and concludes that in the circumstances of this case the federal courts have power to prevent "a potential injustice of substantial proportion" (R. 97). With both the majority and minority agreeing on the unjust outcome below, the issue here is whether judicial power is too limited to achieve what all agree should be the fair result.[4]

Summary of Argument

A

The Government rests its case largely upon the proposition that sovereign immunity exempts the United States from estoppel and tolling in civil litigation. But this proposition so heavily relied on by the Government is wrong in general and is wrong in particular as applied to the statute here involved. For, not only do reason and precedent reject the general proposition that tolling and estoppel are un-

[4] Petitioner Kondo differs from the class of petitioners represented by petitioner Honda only in that she received neither the 1958 letter from the Government requesting surrender of her original certificate nor the 1959 notice that her claim had been dismissed (R. 42). The reason for this was that the Government had misaddressed those two communications (R. 47). Moreover, having failed to furnish the Government with a change of address notice, Mrs. Kondo also did not receive the 1961 Yokohama Bank schedule which was mailed to an address where she then no longer resided. Nevertheless, adhering to its statute of limitations argument to the point of *reductio ad absurdum*, the Government contended that if Mrs. Kondo had given notice of change of address she would have received the 1961 OAP schedule which, standing alone, would have been adequate statutory notice to commence running of the sixty-day limitation of Section 34(1). Accordingly, the Government refused to honor Mrs. Kondo's 1964 request for a return and those of others similarly unnotified, and successfully argued in the court below that the 60-day limitations period barred her 1964 suit. Only after the petition for certiorari had been filed in this Court did the Government shift its position and announce its readiness "to make payment" to Mrs. Kondo (Opposition p. 12, n. 5). The Government's backdoor confession of error in *Kondo* commendably recognizes the stark injustice of its rigorous application of limitations. But it remains unclear, even at this stage of the litigation, why the same considerations do not call for a like confession for all the petitioners before the Court.

available against limitations pleaded by the Government, but in the case at bar both the Constitution and the Trading With the Enemy Act require the application of tolling or estoppel, whatever the general rule might be in other circumstances.

To avoid Fifth Amendment invalidity in a case arising from Government taking of private property, every presumption should be indulged against the inference that sovereign immunity precludes an equitable suspension of limitations necessary to avoid a grave injustice. In its appropriation of the Yokohama Specie Bank's assets, the Government has taken petitioners' property and has directly affected their property interests. Fair opportunity for recoupment is all that saves the original taking from constitutional invalidity. The constitutional rights of just compensation and due process cannot be abridged by the harsh and inequitable application of statutes of limitations. This Court should indulge every presumption against the inference of Congressional intent to immunize the Government from equitable tolling or estoppel of this Act's limitation period.

Actually, far from preserving sovereign immunity, Congress made such normal rules of civil litigation as limitations tolling applicable under the Trading With the Enemy Act. Most significant in appraisal of the Government's plea for immunity from equitable tolling and estoppel is the absence of a single word in the Act or its history which would support such an exemption. On the contrary, both Section 33 and 34(a) of the Act expressly apply limitations tolling in certain instances, and the House Judiciary Committee emphasized "fairness" and "practical sense" in recommending these tolling provisions.

But were this Court somehow unpersuaded by the special constitutional and statutory circumstances here involved,

it is also clear that even in an ordinary "suit-against-the-sovereign" situation, once Congress has permitted suit against the United States neither reason nor precedent support Government exemption from equitable suspension of limitations. In appropriate circumstances federal courts have tolled and estopped Governmental pleas of limitations under various federal enactments; and, in at least one such instance, the decision has been cited with approval by this Court. See *infra*, p. 28. Moreover, this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, estopped a plea of limitations on behalf of the Government against a delinquent taxpayer; we cannot believe that in civil litigation the Government can be exempt from rules it invokes against others, and which are generally available between private litigants. When the Government becomes a defendant following Congressional authorization of suit against it, the statutory limitation period is amenable to equitable tolling and estoppel in appropriate circumstances.

B

In the circumstances of this case, tolling or estoppel of limitations is required to prevent manifest injustice and afford to eligible claimants the restitution Congress commanded. *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, cites a variety of circumstances under which estoppel or tolling is called for by "the interests of justice" and prescribes that fundamental considerations of justice provide the guiding norm to be applied in each case as it presents its individualized equities.

It is clear that there are here presented the strongest considerations calling for equitable suspension of the Act's normal 60-day limitation. Here (1) petitioners relied on the Government's initial offer of restitution at the 2% post-war conversion ratio and seek recovery based on its change

of position in 1964 after this Court's grant of review in *Aratani;* (2) between 1961 and 1964 petitioners reasonably awaited the outcome of the *Aratani-Abe* litigation, anticipating equal treatment following its resolution, and when equal treatment was refused they filed this suit before expiration of the *Abe* litigation; (3) the Government was from the first implicated in petitioners' "delay" by the 20 years which elapsed before OAP issued its controlling administrative ruling, and by its confusing, burdensome, and discouraging representations and demands upon petitioners; and (4) sheer injustice results if the Government may abuse limitations in the present suit to bar recovery by citizens whose statutory eligibility for restitution has long been conceded.

Each of these four salient considerations would suffice to invoke an estoppel or tolling on behalf of petitioners whose delay in suit was at most an immaterial technical default. But, when all four considerations are taken together, an overwhelming case for tolling and estoppel is made out. And, if all this were still not enough, there remains the underlying constitutional concern for the fullest rights of restitution following summary Government seizure of private property.

Argument

The refusal of the majority below to sanction a suspension of limitations rests principally on its view that, notwithstanding the admittedly unjust result, a suspension of limitations cannot be applied to the Federal Government. As we demonstrate in Point I below, there is neither reason nor precedent for granting general Government immunity from limitations tolling and estoppel, and indeed a major Fifth Amendment issue would arise from such immunity following summary Government seizure and vesting of pri-

vate property. The majority below also questions whether the facts of this case warrant the application of estoppel or tolling. In Point II we demonstrate that the test of limitations suspension adopted by the majority is far too narrow and that compelling considerations of fundamental justice and preservation of the Congressional intention to redress legitimate debt claims require tolling or estoppel of the 60-day limitations period in this case.

I

Equitable Tolling or Estoppel of the Trading With the Enemy Act's Limitation Period Is Not Barred by Sovereign Immunity.

In this case the Government concedes—as it must in view of the rulings in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424 (and see *infra*, p. 24, n. 6)—that limitations prescribed by federal statutes may in appropriate circumstances be judicially tolled or estopped. Nor has the Government cited any text or legislative history of the Trading With the Enemy Act intimating that its 60-day limitation period is somehow less susceptible to tolling or estoppel in appropriate circumstances. Instead of legislative evidence as to the meaning of the Trading With the Enemy Act, the Government has claimed a universal rule that sovereign immunity exempts the United States from estoppel and tolling in civil litigation. Accepting that view, the majority opinion in the court below holds (R. 78) that "estoppel cannot be used against the Federal Government" to overcome a limitations period.

That view is erroneous. Should this Court be required to rule on the general question whether tolling and estoppel are available against the Federal Government's plea of limitations, we demonstrate in a succeeding subsection

(*infra*, pp. 27 to 30) that any general exemption from limitations suspension is unsupported by reason or precedent and is actually contravened by judicial authorities which have tolled and estopped limitations pleaded by the Government. But, apart from the general question, there is particular evidence here that Congress in the Trading With the Enemy Act accepted the principle of limitations tolling (see *infra*, pp. 24 to 27). And, in any event, there is here a fundamental constitutional reason for construing this Act to permit rather than to preclude limitations suspension necessary to avoid a serious injustice. For, with respect to claims upon private property summarily seized and appropriated by the Government, it is not sovereign *immunity* but the Fifth Amendment's requirement of sovereign *liability* which is controlling. When the just compensation clause of the Fifth Amendment applies, the Government is "bound to pay" because the clause itself is a constitutional waiver of any immunity which might otherwise exist. See *Alabama* v. *United States*, 282 U.S. 502, 507; *Phelps* v. *United States*, 274 U.S. 341, 343; *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79-80.

Under the just compensation proviso of the Fifth Amendment as well as its due process guarantee, the Government's summary seizure of private property and its 20 year delay in ruling upon rights of return, become constitutionally impaired if the citizen is then reduced to an inexorable requirement for suit within 60 days notwithstanding excusable reasons for delay and the injustice of applying the time-bar.[5] The constitutional right of just

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[5] ". . . it has been held that statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void." *Campbell* v. *Haverhill*, 155 U.S. 610, 615. In the present case any constitutional doubt about the adequacy of a 60-day

compensation cannot be abridged by the harsh and inequitable application of statutes of limitations. The summary appropriation context of the present case thus places direct constitutional inhibitions on sovereign immunity and it renders unnecessary a ruling by this Court, beyond the confines of this statute, on the Government's general vulnerability to equitable tolling and estoppel in a genuine sovereign immunity situation.

1. *To Avoid Fifth Amendment Invalidity, Every Presumption Should Be Indulged Against the Inference that Under this Statute Sovereign Immunity Precludes Equitable Suspension of Limitations.*

The summary seizure and vesting of property which preceded enactment of the Trading With the Enemy Act's 1946 provisions preclude assertion of any sovereign immunity against fair subsequent opportunity for judicial review of claims upon the seized assets. That teaching of this Court's early ruling in *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 at 566, was recently enlarged upon in *Societe Internationale* v. *Rogers*, 357 U.S. 197. There, this Court emphasized that it is only because of the existence of subsequent judicial review that the original Government seizure of enemy property is "*rescued from constitutional invalidity*". Concerning the particular procedural fairness issues there presented the opinion explained (at pp. 210-211):

> "Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party

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limitations period is avoided by a reading of the statute which permits reasonable extension in appropriate circumstances by equitable tolling or estoppel.

invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analagous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318; cf. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489."

This Court has thus made explicit the necessity of subsequent judicial review to save summary Government appropriation from fundamental invalidity under the Fifth Amendment. Nor has the Government in this case, in claiming sovereign immunity from estoppel and tolling, sought to dispute that proposition. Instead, it has denied that its claim of immunity has created a Fifth Amendment issue, arguing that petitioners as depositors in the Yokohama Bank were in a mere debtor-creditor relationship to it and therefore the Government never seized "their" property. The majority below went astray (R. 80) when it adopted this faulty answer to petitioners' Fifth Amendment objection to Government immunity from tolling or estoppel. For, in its appropriation of the Yokohama Bank's

assets the Government has also taken petitioners' property and it has directly affected their property interests.

We submit that, within the meaning of the Fifth Amendment, the seizure and vesting of the assets of the California branch of the Yokohama Bank constituted a taking not only of the property of the Bank but also of the property of its savings depositors. After all, the just compensation clause is not an exercise in common law technicalities but a guarantee that the Government will make whole those who have been injured by its appropriation of private property. Certainly the appropriation of the entire domestic assets of the Yokohama Specie Bank, Ltd., including petitioners' aggregate deposits therein, was in every practical effect a taking of petitioners' property. At the very least, when the Bank's assets were permanently appropriated by the Government, there was a *taking of petitioners' fair opportunity to recoup* the 1941 value of their deposit accounts from the Bank. But for the Government's seizure of the fund, petitioners presumably could have redeemed their deposits with the bank in California after Pearl Harbor at the 1941 rate without suffering the wartime deterioration of the yen.

That was the very point underlined by the Report in 1946 of the House Judiciary Committee upon the new provision enacted as §34 of the statute (H.R. Rep. No. 2398, 79th Cong., 2d Sess., p. 10, emphasis supplied): "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concur in the view that there exists a strong moral obligation to satisfy them inasmuch as, *but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors.*" This express legislative history clearly invokes the presumption this Court has indulged (see, e.g., *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737) that

Congress intended just compensation not only to the immediate owner of property appropriated by the Government, but equally "to those deprived" of secondary benefits in or of legal rights upon the property taken. Indeed, this Court held in *International Paper Company* v. *United States*, 282 U.S. 399, 407, that a taking of the total output of an electric power company for war-time use required just compensation also to a private lessee of the company, whose partial leasehold interest was thereby effectively invaded, stating that "There is no room for quibbling distinctions between the taking of power and the taking of water rights." The distinction between the taking of a bank's deposit account funds and the taking of the depositors' accounts is, we submit, equally quibbling. It is thus clear that, within the meaning of the Fifth Amendment, the Government has taken petitioners' property and property rights. See also *Armstrong* v. *United States*, 364 U.S. 40, 44, where liens on property taken by the Government were held to be "compensable property interests within the meaning of the Fifth Amendment."

But even in the remote event of a contrary construction, a due process issue would still arise if after the Government's summary seizure of a private bank's assets fair opportunity were denied for recoupment by its depositors. In the much more tenuous context presented in *Greene* v. *McElroy*, 360 U.S. 474, this Court re-emphasized the applicability of the due process clause to Governmental interference with private relationships. There the revocation of the Defense Department's security clearance had seriously affected Mr. Greene's ability to obtain private employment. This Court recognized (at 493, n. 22) the applicability in those circumstances of due process norms, noting that the Government's actions had:

> "... caused substantial injuries, *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152, (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. *Philadelphia Co.* v. *Stimson*, 233 U.S. 605."

This Court's emphasis in *Greene* on the freedom from Government actions "which substantially impair" private property interests is doubly applicable in this case. The suggestion that the Federal Government can seize enemy funds and then, by interposing sovereign immunity, bar restitution to loyal citizens having legal claims upon the seized assets, would sanction violation of the constitutional guarantees of substantive and procedural due process. The argument that due process runs only to the "enemy" whose property was appropriated but not to the United States citizens whose deposit-redemption rights were thereby forfeited is too extravagant for serious consideration.

Accordingly, whether measured against the just compensation or the due process guarantee, sovereign immunity fails on fundamental Fifth Amendment grounds as a rationale for barring equitable estoppel or tolling of limitations under the Trading With the Enemy Act. To avoid Fifth Amendment invalidity, this Court should indulge every presumption against an inference of Congressional intent to immunize the Government from tolling or estoppel of the Act's limitation period. As we next show, there is no slightest Congressional implication of such an intent, and, indeed, ample evidence to the contrary.

2. Far From Preserving Sovereign Immunity, Congress Made Such Normal Rules of Civil Litigation As Limitations Tolling Applicable Under the Act.

Judicial power to toll or estop limitations has been upheld under a wide variety of federal enactments and is now recognized as applicable in the absence of evidence that Congress has made a prescribed limitation period wholly inexorable.[6] Most significant in appraisal of the Government's plea for immunity from equitable tolling and estoppel is the absence of a single word in the Trading With the Enemy Act or its history which would support such an exemption. On the contrary, the text and legislative history demonstrate that Congress recognized the operation under the Trading With the Enemy Act of such normal civil rules as equitable tolling and estoppel of limitations.

It is preliminarily to be noted that one of the five "major objectives" of the 1946 legislation (H. R. Rep. 2398, 79th Cong., 2d Sess., p. 1) was to provide for the payment of debt claims "on an equitable basis to the extent that the assets vested from each debtor permit", and that fair distribution of vested assets to non-enemy creditors was thus the underlying purpose of Section 34. Moreover, in providing for judicial review under Section 34 (e) and (f) in debt claim cases by civil suit in the District Court for the District of Columbia, Congress showed its high concern for the rights of the claimants. And the Committee was at pains to emphasize that "no injustice should result" from centralized and regulated review in the District, and pointed out that under the measure the Custodian's fact

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[6] See, e.g., *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424 (FELA); *United States* v. *Price-McNemar Construction Co.*, 320 F. 2d 663 (Miller Act); *United States* v. *Woodbury*, 359 F. 2d 370 (False Claims Act); *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (Suits in Admiralty Act); *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (Clayton Act); *Osbourne* v. *United States*, 164 F. 2d 767 (Jones Act).

determinations were made amenable to full judicial review and even to further evidentiary re-examination (H. R. Rep. 2398, p. 14).

Most significant is the manifested Congressional desire to preserve the rights of claimants with respect to the tolling of limitations. The Act provides that in suits for return of property under Section 33, in computing the two year limitation "there shall be excluded any period during which there was [formerly] pending a suit or claim for return . . .". The House Committee (H. R. Rep. 2398, p. 9) explained this limitations-tolling rule in succinct terms: "*fairness requires that there be excluded any period during which . . . a suit has been pending pursuant to section 9 (a).*" In Section 34 the limitations-tolling principle is once again recognized. The provision of Section 34 (a) concerning the Custodian's right to assert against a debt claim any defense which would have been available to the debtor stipulates that "the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations." The Committee explained that this provision was included "*since in a practical sense creditors do not have normal opportunities for collection of their debts during war*" (H.R. Rep. 2398, p. 11).[7]

These provisions, we submit, most directly evidence Congressional recognition that limitations periods may be tolled in appropriate circumstances. With respect to the very class of persons presently before this Court—statutory debt claimants under Section 34—the Committee stated that obligations of suit within statutory limitations

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[7] Limitations suspension is also recognized in § 3β(c) of the Act, governing tax liability, where it is provided that "Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter . . ."

periods were tolled during the war because "in a practical sense" opportunities for suit had then been impaired. Having so clearly recognized the applicability of limitations tolling, it defies belief that Congress intended to make the 60-day limitation of Section 34(f) unamenable to the accepted judicial power of equitable suspension.

But even if Congress had not so clearly accepted limitations tolling, there would be no occasion for implying in the statute an exemption from the equitable estoppel principle generally applicable under federal enactments. Once sovereign immunity has been waived, courts have been reluctant to narrow that waiver by reading into the statute, by virtue of sovereign immunity, restrictions and limitations beyond those Congress has explicitly required. That sovereign immunity from equitable tolling and estoppel was preserved by the Congress by mere inference and implication is repelled by the fact that Congress nowhere expressed any concern to preserve sovereign immunity, and that by enacting Section 34(f) Congress itself waived any immunity from suit which might otherwise have existed. Congress having done this, sovereign immunity cannot make a comeback by courts reading into the statute special Governmental exemptions from usual judicial powers. Cf. *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383.

In *Indian Towing Co.* v. *United States*, 350 U.S. 61; *Rayonier* v. *United States*, 352 U.S. 315; and *United States* v. *Muniz*, 374 U.S. 150, this Court ruled on Government arguments for implied exemptions in the Federal Tort Claims Act flowing from sovereign immunity. The exemptions were refused, and in its *Muniz* opinion (at p. 165) this Court explained that result in terms applicable to the Government's present argument:

"We should not at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Rayonier* v. *United States, supra* at 320, 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress . . .' "[8]

Government immunity from suspension of limitations was nowhere reserved by Congress in Section 34(f) of the Trading With the Enemy Act. It cannot now be judicially read into the Act, particularly in view of the constitutional considerations heretofore discussed and of the Congressional emphasis that the limitations-tolling principle was to apply under the statute. But were this Court somehow unpersuaded by the special constitutional and statutory considerations here involved, it is also clear that even in an ordinary "suit-against-the-sovereign" situation, once Congress has permitted suit there is no reason or precedent for granting sovereign immunity from a suspension of limitations when necessary to prevent a fundamental injustice.

3. *Once Congress Has Permitted Suit Against the United States, Neither Reason Nor Precedent Supports Governmental Exemption From Tolling And Estoppel of Limitations.*

In appropriate circumstances courts have tolled and estopped Government pleas of limitations under various federal enactments. See *Northern Metal Co.* v. *United States,*

[8] One commentator has noted with respect to estoppel against the Government that "In the United States the doctrine of sovereign immunity is in current disfavor and offers uneasy support to doctrines that work hardship and injustice." Berger, *Estoppel Against the Government,* 21 U. Chi. L. Rev. 680, 683.

350 F. 2d 833, 839 (C.A. 3, 1965); *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2, 1947); *N.V. Philips'* v. *A.E.C.*, 114 App. D.C. 400, 316 F. 2d 401; *Vestal* v. *Commissioner*, 80 App. D.C. 264, 152 F. 2d 132, 136; *McWilliams* v. *United States*, 138 F. Supp. 863 (Ct. Cl., 1956); *Exchange and Savings Bank* v. *United States*, 226 F. Supp. 56 (D. Md., 1964); *Borg-Warner Corp.* v. *United States*, 39-1 U.S.T.C. Par. 9292 (N.D. Del., 1939). The Second Circuit's *Osbourne* decision, *supra*, was recently cited with approval by this Court in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, 427. The Government has cited no compelling reason or authority to impair these rulings. Rather, for its broad claim of immunity from judicial suspension of limitations, the Government relied below upon the rulings in *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, and *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380. But these are cases of promissory rather than equitable estoppel, where an unauthorized representation by an agent of the Government was claimed by plaintiffs to have created a financial obligation of the United States. As the Government put it in its brief below, these rulings establish that the United States is not estopped by the acts of its agents who "without authority, enter into agreements to do what the law does not sanction or permit." But that proposition is inapplicable in the present case, for estoppel has frequently been invoked against the Government where, as here, its agents have made representations within rather than beyond their authority.[9]

Nor is there an effort here to create an obligation of the United States by estoppel and without Congressional sanction. The Government has long ago recognized petitioners as legitimate statutory debt claimants entitled to recoup their 1941 savings deposits from available vested assets.

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[9] See cases collected in Berger, op. cit., *supra*, note 8, at 687, n. 48.

Far from any *enlargement* of the Government's liability, the question is whether an existing statutory obligation to pay valid debt claims may be narrowed and *destroyed* by OAP representations and conduct which induced petitioners to await the outcome of the *Aratani* and *Abe* test suits. Thus, an evenhanded application of the underlying norm in *Utah Power* and in *Merrill* would indicate that if the representations of Government agents in those cases could not create substantive liability, so here such representations cannot be permitted to destroy liability through a subsequent inequitable Government plea of limitations.

Moreover, this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61 (see also *United States* v. *Woodbury*, 359 F. 2d 370) has estopped a plea of limitations on behalf of the Government against a delinquent taxpayer. We cannot believe that in civil litigation the Government can be exempt from rules it invokes against others, and which are generally available between private litigants. *Cf. supra*, p. 25, n. 7. The Government has cited no precedent for judicial application of special rules of civil litigation once the Government has been made amenable to suit. Cr. *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356. Indeed, exempting the Government alone from equitable estoppel and tolling available against other defendants would contravene this Court's repeated view that government is held to the *highest* rather than to diminished standards of fairness in the adjudicative process. See, e.g., *Communist Party* v. *S.A.C.B.*, 351 U.S. 115; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Speiser* v. *Randall*, 357 U.S. 513; *Brady* v. *Maryland*, 373 U.S. 83.

Far from any special Government exemption from limitations suspension, the correct rule would appear to be that recently applied by the Third Circuit in *Northern Metal Co.* v. *United States*, 350 F. 2d 833, 839, where an action under the Suits in Admiralty Act against the Federal

Government for money due was entertained even though filed after the statutory limitation period. The plaintiff failed to sue while awaiting the outcome of administrative proceedings and meanwhile the statutory limitation period passed. A tolling was ordered by the Court to avoid a result "harsh and out of harmony with the purpose and intention of Congress" to afford substantive redress. No less harsh is application of limitations to these petitioners who awaited the outcome of the *Aratani* and *Abe* litigation.

Though we believe the general rule unnecessary of decision in this case involving special Fifth Amendment considerations and the specific legislative evidence previously discussed, we submit that the corfect rule is reflected in *Northern Metal* and like decisions: when the Government becomes a defendant following Congressional authorization of suit against it, the statutory limitations period is amenable to equitable tolling and estoppel in appropriate circumstances. We demonstrate in the next point that appropriate circumstances are indeed presented for deeming this suit to have been timely filed.

II

In the Circumstances of this Case Tolling or Estoppel of Limitations Is Required to Prevent Manifest Injustice and Afford to Eligible Claimants the Restitution Congress Commanded.

"Among all the spheres of its activity estoppel probably performs no more useful service than in the alleviation of hardship caused by statutes of limitation." Dawson, *Estoppel and Statutes of Limitation*, 34 Mich. L. Rev. 1. That estoppel of a federal limitations plea is within the power of federal courts is indisputable since this Court's decision in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, where a defendant's inducement of the plaintiffs'

delay invoked fundamental equitable grounds for estopping his plea of limitations. And in its still more recent decision in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, this Court made tolling available under a federal statute where delay in suit had caused no prejudice since defendant was on notice of the plaintiff's claim before expiration of the limitations period.

Burnett provides guiding criteria governing equitable tolling and estoppel of limitations. There, after reviewing the underlying purpose of limitations, the Court concluded that the "policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights," and the Court cited a variety of circumstances under which estoppel or tolling is called for by the "interests of justice".[10] The *Burnett* opinion declines to define any technical standard for tolling and instead prescribes (at p. 427) that "the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances". Like other traditional equity rules—and particularly the "flexible instrument" of equitable estoppel—fundamental considerations of justice provide the guiding norm to be applied in each case as it presents its individu-

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[10] "Thus, this Court has held that an FELA action is not barred, though brought more than three years after the cause of action accrued, where a defendant misled the plaintiff into believing that he had more than three years in which to bring the action. *Glus* v. *Brooklyn Eastern Terminal, supra.* Moreover, it has been held that the FELA limitation provision is tolled when war has prevented a plaintiff from bringing his suit, even though a defendant in such a case might not know of the plaintiff's disability and might believe that the statute of limitations renders him immune from suit. See *Osbourne* v. *United States,* supra; *Frabutt* v. *New York, C. & St.L.R. Co.,* supra. In such cases a plaintiff has not slept on his rights but, rather, has been prevented from asserting them.

"Considerations in favor of tolling the federal statute of limitations in this case are similar to those leading to an extension of the limitation period in the cases mentioned above" (380 U.S. at 428-29).

alized equities.[11] And it is just such fundamental interests of justice which this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, found controlling in estopping a taxpayer from pleading limitations against the Government. There the taxpayer's own request for further administrative action had induced the Government to delay its suit; this Court applied estoppel against limitations stating that: "To know whether liability has been barred by limitation it will not do to refer to the flight of time alone . . . It may have been postponed by deliberate persuasion [by the taxpayer] to withhold official action" (291 U.S. at 61).

Applying these guidelines to the case at bar, it is clear that there are here presented the strongest considerations calling for equitable suspension of the Act's normal 60-day limitation. Here (1) petitioners relied on the Government's initial offer of restitution at the 2% post-war conversion ratio and seek recovery based on its change of position in 1964 after this Court's grant of review in *Aratani*; (2) between 1961 and 1964 petitioners reasonably awaited the outcome of the *Aratani-Abe* litigation, anticipating equal treatment following its resolution, and when equal treatment was refused they filed this suit before expiration of the *Abe* litigation; (3) the Government was from the first implicated in petitioners' "delay" by the 20 years which elapsed before OAP issued its controlling administrative ruling, and by its confusing, burdensome, and discouraging representations and demands upon petitioners; and (4) sheer injustice results if the Government may abuse limitations in the present suit to bar recovery by citizens whose statutory eligibility for restitution has long been conceded.

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[11] The foundation of equitable estoppel "is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights . . . The doctrine of equitable estoppel is pre-eminently the creature of equity." Pomeroy, *Equity Jurisprudence*, § 801 (1941 Edition). See also *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National Steamships, Ltd.* [1947] A.C. 46, 55.

i. *Petitioners Relied On The Government's Initial Offer Of Restitution At The 2% Post-war Conversion Ratio And Seek Recovery Based On Its Change Of Position In 1964 After This Court's Grant Of Review In* Aratani.

During the many years when petitioners awaited the Government's administrative disposition of their claims, the "test case" in the Office of Alien Property was that of Kunio Abe. In 1958, petitioners were informed by letters from the OAP (R. 6, 29) that the *Abe* case was concluded and that under its ruling the Government had decided to pay them only at the post-war rate of exchange (i.e., 2%). They were further informed that the right to litigate the conversion rate question would only arise upon the future publication of the Yokohama Specie Bank schedule. Following the OAP's publication of that schedule in 1961, a class action by Yokohama Bank claimants challenging the use of the post-war conversion ratio was filed under the name of *Abe* v. *Kennedy;* petitioners not unreasonably believed themselves protected by that suit (R. 10, 14, 16, 19). As a strictly technical matter, however, that belief was incorrect in the sense that the *Abe* suit had been filed only for those Yokohama Bank depositors who had sent in their original deposit certificates after receipt of the 1958 OAP letter and were thus listed on the 1961 OAP schedule. But that distinction was lost on these thousands of petitioners, many of whom were elderly and non-literate persons unable to read the English language, unrepresented by counsel, and dependent upon other lay persons for advice.[12]

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[12] The uncontested affidavit of Katsuma Mukaeda (R. 19), President of the Japanese Chamber of Commerce of Southern California, sets forth these facts in the following terms:

> "Many of the Yokohama Specie Bank yen deposit certificate holders were old people who could not read English and could not understand the communications they received from the Office of Alien Property; many of them had to rely upon other persons who themselves were not

After this Court granted certiorari in *Aratani* the Government settled that case, and also settled with the Yokohama Bank claimants in *Abe* at the pre-Pearl Harbor conversion ratio (without interest). Yet, inexplicably, it rejected (R. 46) repeated requests to afford similar treatment to petitioners' deposits in the same bank. Since the Government has on hand adequate vested assets of the Yokohama Bank to afford petitioners the same treatment as their fellow claimants in *Abe*, it is difficult to understand why the Government has declined to do so, nor has it volunteered an explanation at any time in this litigation. Whatever be the reason for the Government's refusal, the relevant fact is that it did first make a 2% offer and representation and then in 1964 it did change its position in its settlement of the *Abe* case after this Court's grant of *certiorari* on the conversion-ratio question. That the fundamental elements necessary for an estoppel were thereby created is the conclusion set forth in the following succinct terms by the dissenting opinion below of Judge J. Skelly Wright (R. 98-99):

> "The 1958 letter unquestionably contained an authorized representation of fact—that it was the Govern-

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able to understand the letters; most of the claimants had never talked to a lawyer about their cases and there was a general feeling in the community that all of the claims were going to be treated alike, both the Sumitomo Bank claimants and the Yokohama Specie Bank claimants; there was knowledge in the community that a law suit had been filed in Washington and it was understood and believed that the outcome of that law suit would determine how much money the claimants received and that it would apply to all claimants not just some . . ."

Mr. Mukaeda's uncontested representation of record that most of the claimants had never spoken to a lawyer about their cases is confirmed by the fact that in 1961 counsel for petitioner Honda (see J.A. 9) only represented some fifty claimants, and by review of a sample of the files submitted for inspection by the Department of Justice which shows that a majority of the numerous petitioners herein were not represented by counsel before the OAP.

ment's position that payment should be made at the post-war rate. This representation was relied upon by appellants when they failed to file their certificates, knowing full well they could get the same rate at any time in Japan. The Government knew reliance might follow, and encouraged such reliance by suggesting Japan as an alternate, speedier source of funds. That only 1,817 of about 7,500 eligible claimants complied with the letter is strong evidence of its effect.

"It turns out, however, that the Government's position changed. When the Supreme Court granted *certiorari* in *Aratani*, the Government settled the cases on a basis completely at variance with its original position. The power of the Government to take its 1958 position, and to change its position in 1963, is incontestible. But the exercise of this power cannot become a means, whether intentional or inadvertent, whereby innocent persons who acted in reliance upon the Government's first representation should be denied the opportunity to recoup moneys which Congress wanted returned. The pattern of events—the letter which discouraged filing of certificates because of the position taken therein, the failure of the vast majority of claimants to file certificates, the subsequent change of position and settlement, the exclusion of appellants from the benefits of the change of position—could hardly have been better designed to secure exclusion of most claimants from the relief Congress afforded them, and from the relief to which the Office of Alien Property now apparently agrees they were always entitled."

Clear as is the case for equitable estoppel urged by Judge Wright, he appears to go one step further and recognize the corollary question whether the statute of limitations

ever commenced to run in 1961 on petitioners' cause of action. Judge Wright emphasizes (R. 99) "the exclusion of appellants from the benefits of the change of position" by the Government in 1964. The Government having changed its position in 1964 and having made a new offer at that time, it not only had the power but the *duty* to treat all Yokohama Bank debt claimants in the same fashion. Thus, the Government is not merely estopped to plead the statute of limitations' expiration in 1961 when it was making a niggardly offer the legality of which it has never attempted to defend in this Court; its subsequent 1964 offer to some Yokohama Bank debt claimants imposed on the Government the obligation to make the same offer to all debt claimants—at least to the 4,100 petitioners who in 1958 declined either to send in their original certificates or to withdraw their claims. That being the case, petitioners acquired the right to avail themselves of the new offer *at the time it was made* to the *Abe* claimants. As we next demonstrate, petitioners' suit to vindicate that right was timely brought in 1964 when the equal treatment they had reasonably anticipated was denied them.

ii. *Between 1961 and 1964 Petitioners Reasonably Awaited the Outcome of the* Aratani-Abe *Litigation, Anticipating Equal Treatment Following Its Resolution, And When Equal Treatment Was Refused They Filed This Suit Before Expiration Of The* Abe *Case.*

Petitioners anticipated that if the *Aratani-Abe* litigation established the inadequacy of the Government's 2% return offer, it would give them equal treatment with their fellow claimants. Certainly that was not an unreasonable assumption, and to this day the basis for refusal by the Government

to pay petitioners the same ratio of return it accorded the *Abe* claimants remains completely unexplained.

In measuring the reasonableness of petitioners' anticipation of equal treatment upon conclusion of *Abe*, it must be recalled that their cause rests on the Government's statutory obligation to pay valid debt claims. In that situation no one could fairly be required to anticipate that the United States Government would make arbitrary and invidious distinctions among claimants, returning 100% on seized savings accounts to 1,800 Yokohama Bank depositors, but relegating 4,100 others to a 2% return from the Bank in Japan even though adequate vested funds are on hand here to give them equal restitution. Under these circumstances, and particularly since the vast majority of petitioners had no assistance of counsel (see *supra*, p. 33, n. 12), it becomes appropriate to effect a tolling of limitations for petitioners while the *Abe* case was in litigation.[13]

A tolling similar to that approved by this Court in *Burnett* would clearly render this suit timely. The *Abe* case was filed within the statutory 60-day period and the present suit was filed in the District Court *before* expiration of the *Abe*

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[13] A defendant's fiduciary relationship has been generally recognized as an adequate ground for barring his plea of limitations. See Annotation, 24 ALR 2d at 1446-1448. The Government as custodian of vested alien property was charged by the Congress under Section 34 of the Act with the obligation to make prescribed disbursements to eligible debt claimants to the extent permitted by available vested assets—a fiduciary obligation. Indeed, a close analogy can be made to the fiduciary relationship of a trustee in bankruptcy in similar circumstances. Let us hypothesize a case of a trustee purporting to make a final distribution. Some creditors later bring suit to force the trustee to collect other assets from the bankrupt and they are successfully collected by the trustee. Certainly *all* creditors would have a right to share equally in the additional assets. So here, once the Government agreed to pay full value to some debt-claimants, it had the obligation to pay the others equally from the admittedly available fund. The default on that Government fiduciary duty having occurred in 1964, it is clear that the statute of limitations did not commence until then and petitioners' action is timely.

litigation. On March 18, 1964 the District Court tentatively approved a settlement in *Abe* acceptable to the Government and the named claimants (228 F. Supp. 706), but the Court expressly limited its approval to an "interlocutory order" subject to protest by any member of the *Abe* class (228 F. Supp. 706 at 710). Subsequently, on May 18, 1964, the District Court entered its formal order approving the *Abe* settlement (*infra*, Appendix, p. 48), which became final 60 days later upon expiration of the time for appeal (see Rule 73(a), F.R.C.P.). Meanwhile, the Department of Justice having refused the benefit of the *Abe* settlement to the present petitioners, this suit had been filed in the District Court on May 19, 1964, one day after entry of the settlement order in *Abe* and well before the appeal time expired.

Just as in *Burnett*, there was no unreasonable delay by petitioners. Just as in *Burnett*, too, a tolling of limitations is appropriate, no prejudice having resulted once the *Abe* case put the Government on notice to defend and this action having been filed before *Abe* was concluded. Since the funds are adequate to pay petitioners on the same basis as the *Abe* claimants, and since the filing of a suit in 1961 would have had no practical effect of any discernible kind, no policy of limitations can possibly prevent, and justice requires, a tolling of limitations during the pendency of the *Abe* litigation.[14]

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[14] Where a statute of limitations has been tolled by a timely action dismissed for wrong venue or other procedural reasons, additional plaintiffs and even different plaintiffs representing the same interest have been permitted to prosecute the second action commenced after the limitation period expired. See Annotation, 3 ALR 824, 825-826. No different rule should apply where the first action has prevailed on the merits than where it has failed for procedural defects. The suit which has prevailed should be deemed to toll limitations sufficiently to permit persons similarly situated to prosecute the same cause of action against the same defendant prior to the expiration of the first action.

iii. *The Government Was From The First Implicated In Petitioners' "Delay" By The 20 Years Which Elapsed Before OAP Issued Its Controlling Administrative Ruling, And By Its Confusing, Burdensome And Discouraging Representations And Demands Upon Petitioners.*

This Court's decision in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, held that equitable estoppel of limitations is particularly appropriate where a defendant has been implicated by his own conduct in plaintiff's failure to file suit within the statutory period. We do not urge that in the present case the Government acted willfully to deceive petitioners. But certainly its entire course of conduct with respect to petitioners could not have been better calculated to lull them into inaction through delay, discouragement, confusion, fear, and disgust. Since the ultimate aim of estoppel against limitations is to prevent unjust defeat of legal rights, it is available "even though the inducement to delay was done innocently or unintentionally" by the defendant (*Peters* v. *St. Paul Fire & Insurance Co.*, 213 F. Supp. 441, 442 (S.D.N.Y., 1963) and without the necessity of any misrepresentation by defendant. Thus, in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, the Government was afforded estoppel against limitations though the defending taxpayer had made no misrepresentation; in *United States* v. *Woodbury*, 359 F. 2d 370, 375 (C.A. 9, 1966) the United States as claimant was recently granted a tolling of limitations under the False Claims Act where no prejudice had arisen from its choice of the wrong forum of litigation, the limitation period meanwhile having expired; and in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (C.A. 3, 1965) limitations was recently tolled against the Federal Government in the absence of any misrepresentation, during the pendency of administrative proceedings.

The Government conduct which sparked the entire se-

quence of presently relevant events was the 1958 letter from the OAP to the 7,500 Yokohama Bank claimants offering them a mere 2% return and demanding immediate surrender of their original deposit certificates. That unexplained demand was particularly arbitrary when it is recalled that some ten years earlier the claimants had filed certified claims (usually by photostatic copy of the deposit certificate), that no question about the authenticity of the claims was being raised, and that to this day the OAP's need for original certificates in 1958 remains obscure. Moreover, the 1958 letter to the claimants was unnecessarily confusing on the question whether the original certificates were being demanded also from those who rejected a 2% return, since it stated that "if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of" 2% of 1941 value. Whatever may have been intended, the failure to explain the Government's need for the original deposit certificates coupled with the confusing communication with respect to their submission, led to the natural inference that a surrender of the original deposit certificate might constitute acquiescence in the 2% return offer.

Indeed, by its enclosure of a claim cancellation card to each claimant, the Government's 1958 letter also exhibited most clearly its zeal not to protect the rights of the claimants but simply to reduce the number of pending claims. Certainly, at a time when the Department of Justice had just reversed its own Examiner's ruling that the 1941 conversion ratio *should* apply and before any judicial test on the conversion ratio issue had been or could have been filed, the Government's *sua sponte* suggestion that the claimants should withdraw their claims and simply cash their certificates in Japan for 2% was both highly improper and prejudicial. The claimants were thereby effectively caught between the Scylla of accepting the Government's sugges-

tion of a 2% return in Japan (and cancellation of their debt claims) and the Charybdis of possibly acquiescing in the 2% offer by sending in original certificates demanded by the Government's return offer. Thus the Government is deeply implicated in the failure by the majority of the recipients of the OAP's 1958 letter to take either course—particularly because *both* courses of affirmative action suggested by the Government constituted improper, arbitrary, and officious instructions tending to cause the surrender rather than enjoyment of the claimants' statutory rights.

Some 1,600 of the 7,500 recipients of the "Notice of Cancellation of Claim" card signed and returned it to the OAP upon reading in the letter that "under the circumstances you may wish to utilize the funds in Japan rather than await settlement by this Office." Some 1,800 others sent in their original deposit certificates. A majority—the 4,100 petitioners in this suit—having already waited 17 years for return of their savings accounts, took neither course and simply continued to await further developments. Those further developments were the filing of the *Abe* suit in 1961, its settlement in 1964 granting each litigant the full 1941 value of his savings deposit, and the Government's 1964 refusal to accord petitioners the same treatment as these other Yokohama Bank claimants.

In measuring the appropriateness of an estoppel here against the plea of limitations, where the Government itself has been implicated in the plaintiffs "delay", it is material that twenty years of delay through no fault of petitioners occurred between the seizure of their assets and the publication of the OAP schedule in 1961 which the Government asserts commenced the running of the 60-day limitation period. It is equally material that petitioners were at best confused by the Government's prolix instructions in 1958 and many actually feared to surrender their last evidence of indebtedness and possibly their right of full return by

mailing in their original deposit certificates in response to the 2% payment offer. And it is relevant that the Government in the very letter offering that piddling restitution and demanding surrender of the original deposit certificates, counseled the abandonment of statutory claims by the claimants' acceptance of 2% in Japan. It is hardly surprising that most of the claimants failed to send in their original certificates in response to the Government's insulting and erroneous suggestion, 17 years after seizure of their rights, that they could have no more than and should settle for 2% restitution. *What is surprising is that the Government, which delayed 20 years before it finally made its indefensible and undefended 2% offer, should even ask this Court to bar petitioners' admittedly valid claims because of their more than 60-day delay in suit while* the Aratani-Abe *litigation was pending.*[15]

It is inconceivable that the Congress which in 1946 enacted provisions to assure a fair disbursement of vested assets to non-enemy debt claimants would have sanctioned such small regard by the OAP for the interests of thousands of claim-

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[15] The Congress which in 1946 enacted the 60-day limitation period would have been surprised indeed by the proposition that the OAP would take 15 more years before issuing its administrative determination concerning petitioners' claims and then hew inexorably to the 60-day bar. The Committee report (H.R. Rep. 2398, 79th Cong., 2d Sess., p. 12) noted but rejected a recommendation that it set a time limit upon the OAP's administrative determinations, stating that the Custodian *"has strongly affirmed his desire and intention . . . to proceed with all possible dispatch, and the claimant's day in court will follow by way of review of his determinations . . ."*. In the face of this Congressional insistence on expedition, the Government continues to urge that it could delay for 15 years after the 1946 enactment before issuing its ruling to petitioners, and then inexorably bar their "day in court" on the 61st day following that administrative action. Precedent, as well as justice, preclude such a result. Thus, in a case where the Atomic Energy Commission delayed for years in carrying out its Congressional duty, the Government was estopped from applying the usual limitations period to bar a suit by plaintiffs who had been affected by the Government's own delay. *N. V. Philips'* v. *A.E.C.*, 114 App. D.C. 400, 316 F. 2d 401.

ants as has been shown to these citizens. Every Congressional purpose, we submit, is served by precluding the Government from now asserting the 60-day limitation as a wholly technical bar to petitioners' statutory right to payment. Particularly is this so, as we next show, in view of the fact that the Government has conceded and does not now deny the legitimacy of petitioners' statutory claims and would thus invoke limitations simply to preclude the very disbursement from vested assets which Congress long ago made mandatory.

iv. *Sheer Injustice Results If the Government May Abuse Limitations In the Present Suit To Bar Recovery By Citizens Whose Statutory Eligibility For Restitution Has Long Been Conceded.*

In this case the most elementary consideration of justice calls for judicial suspension of limitations: there has *never been any question* about petitioners' statutory eligibility for an alien property return, which the Government expressly recognized as long back as 1958 (see R. 29-30); thus application of the 60-day bar in this case serves no limitations purpose of protecting a party from having to "defend" against stale claims but simply divests citizens of their conceded statutory rights.

This compelling consideration once more invokes this Court's emphasis in *Burnett* that the purpose of limitations may be outweighed "where the interests of justice require vindication of the plaintiff's rights" and that "the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances". Indeed, this Court's conclusion in *Burnett* (at p. 434) that "The humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served

in doing so", appears even more applicable to the humanitarian purpose reflected in Section 34 of the Trading With the Enemy Act. Every interest of justice is advanced and the central Congressional purpose is served if this suit is deemed to have been timely filed. No clearer interest of justice could call for suspension of limitations than a defendant's concession that the plaintiff's legal claim is meritorious, particularly where the claim rests on the Congressional requirement that valid debt obligations be paid to the extent that vested assets are available for that purpose. Certainly, too, "Congressional purpose is effectuated" by tolling the statute to afford these petitioners the same return granted the *Abe* litigants from the vested assets of the Yokohama Specie Bank remaining in the possession of the Government.

Pertinent also under these circumstances is the landmark ruling of this Court which prompted enactment of the 1946 provisions of the Trading With the Enemy Act. In *Markham* v. *Cabell*, 326 U.S. 404, 409, this Court rejected the Alien Property Custodian's literalistic argument that the Act's limitations period had expired many years before the Second World War. Said the Court of the Government's argument:

> "... the remedy afforded by § 9(a) would be quite illusory and ineffective so far as it applies to World War II claims if § 9(e) were read literally without regard to its history. It was for this reason particularly that the court below refused 'to make a fortress out of the dictionary' and to read § 9(e) strictly and literally. The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United*

States, 143 U.S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.'

* * * * * * *

We have urged herein four salient considerations each of which would suffice to invoke an estoppel or tolling on behalf of petitioners, whose delay in suit was at most an immaterial technical default. But, when all four considerations are taken together, an overwhelming case for tolling and estoppel is made out. And if all this were still not enough, there remains the driving force of the underlying constitutional concern created by summary Government seizure of private property. As this Court emphasized in *Societe Internationale* v. *Rogers*, *supra*, p. 19, courts must exercise special care to safeguard plaintiff-claimants' procedural rights under this statute; plaintiff-claimants are in effect defendants and it is only the subsequent fair opportunity of judicial review by which the original Governmental seizure is "rescued from constitutional invalidity". The necessity of rescuing the constitutional validity of the Government's seizure requires every possible construction of Congressional intent to permit a tolling or estoppel to prevent a fundamentally unjust divestiture of petitioners' rights. *Cf. Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 492.

When all these considerations are put together, petitioners cannot possibly be barred from recovery because of their failure to institute a separate suit between 1961 and 1964 while *Aratani* and *Abe* were pending in federal litigation. In *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319-320, this Court construed the Trading With the Enemy Act in a non-

technical manner which served to avoid unfairness—indeed even constitutional doubts—arising from a contrary reading; it did so by a "cumulative effect" approach even more appropriate in the present case:

> "The concern of the Trading with the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes . . . None of the considerations we have canvassed standing alone is conclusive in favor of the claimant. Perhaps none, by itself, would justify a decision in his favor. The cumulative effect, however, places such a decision well within the bounds of reasonable construction."

Conclusion

In *Glus* and *Burnett* this Court announced principles calling for judicial sensitivity in applying equitable tolling or estoppel of limitations to avoid grave injustice. There are, of course, bounds beyond which courts cannot go in suspending limitations even for deserving plaintiffs. But whatever may be the outside limits of the power of suspension, this is a case falling well within the perimeter of those limits. Beyond all the other considerations tending in that direction which we have briefed herein, there remains the additional consideration that petitioners are loyal Americans who have suffered enough. The thousands of blameless citizens unjustly divested by the ruling below of their property and their statutory rights are the same class of persons who have suffered so much in the past from the Government which now inexplicably resists the return of their savings deposits in the Yokohama Specie Bank.

It is respectfully submitted that the ruling below should be reversed.

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1625 K Street, N.W.,
Washington 6, D.C.,
Attorneys for Petitioners.

Of Counsel:

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California.

BENJAMIN V. COHEN,
1727 Massachusetts Avenue,
Washington, D.C.

APPENDIX

Filed May 18, 1964. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3164-58

GEORGE T. [illegible]ATANI, et al., *Plaintiffs,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant.*

Civil Action No. 3228-58

KYUICHI SUMIYOSHI, et al., *Plaintiffs,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant.*

Civil Action No. 1176-59

KINZUCHI SHIGENO, et al., *Plaintiffs,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant.*

Civil Action No. 2529-61

KUNIO ABE, et al., *Plaintiffs,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant.*

MEMORANDUM AND FINAL ORDER

The above causes came before this Court for hearing on March 9, 1964, on the joint motions of plaintiffs and defendant for approval of a compromise of a class action pursuant to Rule 23(c) of the Federal Rules of Civil Pro-

cedure and for allowance of counsel fees. Subsequently, on March 17, 1964, an Interlocutory Order approving the compromise and awarding the counsel fees was signed. This order directed counsel for plaintiffs to give written notice of the proposed compromise and the proposed counsel fees to all 2,963 claimants. The order further provided that a final hearing on these matters would be held on April 27, 1964, and that any interested party could object to the proposed settlement and fees, either in writing or by appearing in person or by counsel.

The compromise agreement was arrived at by counsel for the Office of Alien Property and counsel for the claimants. The parties then came before this Court and petitioned for approval in accordance with the Federal Rules of Civil Procedure. Counsel did not participate in any of the compromise negotiations before the Court, the tentative agreement having been achieved before the Supreme Court entered its Order, dated March 2, 1964, referring the causes to this Court for the approval of a compromise settlement.

Subsequent to the filing of the petition and prior to the issuance of the Interlocutory Order on March 17, 1964, this Court was satisfied that the proposed agreement was in the best interests of all the parties. However, the Court went beyond the mandatory requirements of Rule 23(c) and required notice by mail to all of the claimants.

Counsel for plaintiffs mailed copies of the Interlocutory Order, along with an explanatory letter, to each of the 2,963 claimants on March 18, 1964. The letter and the order each explained that the claimants should communicate written objections to the Court prior to April 27, 1964.

The Court received three letters setting out objections to the award of counsel fees. Two of these stated that the twenty per cent award was excessive. The claims of these two parties amount to a total settlement of $5,010.36. The third letter stated that the original agreement was for a fee of 10 per cent; this claimant will receive a settlement of $2,425.00.

These objections must be considered in the light of the 2,960 other claims and the total amount of $6,395,357.56. It should also be noted that the three claimants who now

oppose the award of counsel fees would have received a total of $169.15 on the original schedule from the Office of Alien Property. Under the agreed settlement they will receive a total of $7,435.56, due primarily to the efforts by their counsel.

The Court received only one objection to the settlement, and this was from a claimant whose claim was previously disallowed by the Office of Alien Property. In addition, the Court received ten other written inquiries concerning other claims, which had been previously disallowed, changes of address, and other questions relating to the claims.

Affidavits filed by counsel for plaintiffs state that notices have been mailed to all claimants. Counsel further stated for the record that two hundred and fifty-five (255) notices from the first mailing were returned by the post office for various reasons. New addresses have been obtained for many of these claimants and counsel for both parties are continuing in their efforts to contact all claimants.

In addition to the notice by mail, counsel have also obtained publication in at least seven newspapers, in either English or Japanese, in the locales in which a majority of the claimants reside. . . .

ORDER

Accordingly, it is this 18th day of May, 1964,

ORDERED, that the Interlocutory Order of March 17, 1964, be, and the same hereby is, made final, except that the word "pending" is hereby stricken from the last line of page 3 and at the end of the first paragraph of page 4 of the Interlocutory Order; and the Office of Alien Property is directed to proceed with the payments to the respective claimants in accordance with the compromise agreement . . .

IT IS FURTHER ORDERED, that Defendant, following final payment to the class plaintiffs and to counsel, pursuant to the Order of March 17, 1964, and this Order, shall inform the Court to that effect, and present an appropriate order.

LEONARD P. WALSH,
Judge.

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